PP

v.

MUHARI MOHD JANI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CRIMINAL REVISION NO: 43-6-96]
16 MAY 1996

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentence - 18 months imprisonment for police officer pleading guilty to voluntarily causing hurt to extort information from detainee - Detainee died in custody - Nature of injuries and weapon used not known - Officer had good record of service - Loss of pension and job upon conviction - Maximum sentence allowable is seven years - Whether sentence adequate - Whether offence a serious offence - Whether fact that offences committed in discharge of duty a mitigating factor - Whether sentence ought to be enhanced on revision - Penal Code, s. 330*

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Significance of maximum sentence - When should maximum sentence be meted out - Whether maximum sentence ought to be imposed when accused pleads guilty - Whether discount on sentence ought to be given when accused pleads guilty - Purpose of discretion in imposing sentence*

CRIMINAL PROCEDURE: *Revision - Enhancement of sentence - Principles governing revisionary power of High Court - When may High Court enhance sentence on revision - Criminal Procedure Code, ss. 323 to 327 - Courts of Judicature Act 1964, ss. 31, 35, 36 & 37*

CRIMINAL LAW: *Penal Code - Section 330 - Voluntarily causing hurt to extort information - Whether a serious offence - Whether public interest warrants sentence to be deterrent - Whether fact that offences committed in discharge of duty a mitigating factor*

The respondents were police personnel who were convicted and sentenced to 18 months imprisonment upon pleading guilty to a charge under s. 330 of the Penal Code for having voluntarily caused hurt to one Lee Quat Leong ('the deceased') for the purpose of extorting from the deceased information relating to an offence. The deceased was found dead whilst in police custody, apparently having succumbed to the injuries caused by the respondents. The prosecutor failed to disclose the nature of the hurt caused to the deceased or what weapon, if any, was used. The public prosecutor did not appeal against the sentences but the deceased's brother filed this notice of motion for the

High Court to, *inter alia*, revise and increase the sentences. The grounds relied on were that the sentences were manifestly inadequate having regard to the grave nature of the offence under s. 330 of the Penal Code and that the sessions judge, in imposing the sentences, wrongly relied on *Lai Kim Hon & Ors v. PP* despite the Federal Court specifically saying in that judgment that that case was not to be regarded as a precedent in future cases.

Held:

[1a] Under s. 31 of the Courts of Judicature Act 1964, the High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure. Sections 323 to 327 of the Criminal Procedure Code ('the Code') and ss. 35, 36 and 37 of the Courts of Judicature Act 1964 are the provisions relating to revision.

[1b] Pursuant to his revisionary powers, the judge may, as provided for in s. 325(i) of the Code, exercise any of the powers conferred by ss. 311, 315, 316 and 317 of the Code. Under s. 316 of the Code, the judge may, inter alia, "…alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence".

[1c] The powers of the High Court in revision are exercisable at the discretion of the court and that discretion is untrammelled and free, so as to be fairly exercised according to the exigencies of each case. However, the power of revision to increase a sentence ought to be exercised in exceptional cases only. It is to be used sparingly with regard to all the circumstances of each particular case and the thrust would be primarily for the purposes of correcting a miscarriage of justice.

[2] The punishment for an offence under s. 330 of the Penal Code is imprisonment for a term which may extend to seven years and the convicted person is also liable to a fine. There is thus a discretion on the part of the court to determine the term of imprisonment which it may impose on a convicted person for the offence. The purpose of this discretion is to allow the sentencer to select the sentences which he believes to be the most appropriate in the individual case, considering both the facts of the case and any reports on the offender's character.

[3] An offence under s. 330 of the Penal Code is one of the most serious offences known in law and the court must show its abhorrence of it. The public interest requires the court to pass a deterrent sentence on the offender to deter likely offenders.

[4] Police officers are custodians of the law and they have to uphold, not breach, the law. By subjecting members of the public to acts of violence, they in fact infract the very law that prohibits the inflicting of violence by any person on another person and they incalculably undermine and subvert the confidence and trust placed by the public in our police force.

[5] Based on the record of proceedings, it appeared that the sessions judge was not aware of the reservations expressed by the Federal Court in *Lai Kim Hon & Ors v. PP* over the sentences imposed by the trial court. The serious aspect of public interest was also not drawn to the attention of the sessions judge.

[6] The fact that the offences were committed by the two respondents while they were performing their official duties cannot be treated as a mitigating factor. Overzealousness which involves such blatant breaching of the law with the use of violence can never be a mitigating factor. By treating this as a mitigating factor, the sessions judge had erred.

[7a] The sentencing of a sentencer must not be such that it is out of proportion to the gravity of the offence on which the offender has been convicted. The prescribing of a maximum penalty in respect of an offence not only marks the limits of the court's discretionary power as to sentence, it also ordinarily prescribes what the penalty should be in the more serious types of cases falling within the relevant class of the offence meriting the maximum punishment prescribed.

[7b] The principle of holding in abeyance the maximum sentence for the most serious likely instance of the offence should mean that an offender who pleads guilty does not receive the maximum sentence. His plea of guilt provides him with mitigation, so the sentencing court must leave room for the passing of a more severe sentence in a case where the offence is just as grave and the offender pleads not guilty.

[7c] A plea of guilt gives rise to public advantage and avoids the expense and nuisance of a long trial. Thus, the court encourages pleas of guilt by knocking something off the sentence which would have been imposed if there had not been a plea of guilt.

[8] The respondents' pleas of guilt entitles them to a 1/3 deduction off the sentence. An added discount should also be given for two reasons. Firstly, an offender who voluntarily surrenders to the police and admits an offence which cannot otherwise be proved against him is entitled to more than the usual discount on sentence. The inference for the lack of information with regards the nature of the hurt caused to the deceased or what weapon, if any, was used must be that had the two respondents

claimed trial, the prosecutor may not have been able to prove the offence. Secondly, both respondents had good records of service in the police force and they lost their jobs and their pension on conviction.

[Sentence of imprisonment enhanced from 18 months to 36 months.]

Case(s) referred to:
Abdul Kadir Abdul Rahman v. PP [1984] 1 MLJ 80 ***(refd)***
Chunbidya & Ors v. Emperor AIR [1935] PC 35 ***(refd)***
Govind Ramji Jadhav v. State of Maharashta [1990] 1 SCR 855 ***(refd)***
Johnson Tan Han Seng v. PP [1977] 2 MLJ 66 ***(refd)***
Lai Kim Hon & Ors v. PP [1981] 1 MLJ 84 ***(foll)***
Lal Muhammad & Anor v. Emperor [1936] 37 Cr LJ 811 ***(refd)***
Lee Weng Tuck v. PP [1989] 2 MLJ 143 ***(refd)***
Lian Kian Boon v. PP [1990] 2 CLJ 799 ***(refd)***
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35 ***(refd)***
Loh Hock Seng & Anor v. PP [1980] 2 MLJ 13 ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405 ***(refd)***
Palan v. PP [1932] MLJ 124 ***(refd)***
PP v. Audrey Keong Mei Cheng [1996] 2 CLJ 430 ***(refd)***
PP v. Kulasingam [1974] 2 MLJ 26 ***(refd)***
PP v. Leo Say & 2 Ors [1985] 2 CLJ 155 ***(refd)***
PP v. Mahmud [1974] 1 MLJ 85 ***(refd)***
PP v. Ravindra & Ors [1992] 4 CLJ 2043 ***(refd)***
PP v. Soon Tiew Choon [1976] 1 MLJ 189 ***(refd)***
PP v. Teh Ah Cheng [1976] 2 MLJ 186 ***(refd)***
R v. Barnes [1983] 5 Cr App R(S) 368 ***(refd)***
R v. Boyd [1980] 2 Cr App R(S) 234 ***(refd)***
R v. George Maxwell (Developments) Ltd [1980] 2 All ER 99 ***(refd)***
R v. Hoult 12 Cr App R(S) 180 ***(refd)***
R v. Kerr [1980] 2 Dr App R(S) 54 ***(refd)***
R v. Lachiram ILR 28 Bom 533 ***(refd)***
R v. Newton [1982] 77 Cr App R 13 ***(refd)***
R v. Roy ILR 42 Cal 422 ***(refd)***
R v. Sarjeant [1974] 60 Cr App R 74 ***(refd)***
R v. Taggart [1979] 1 Cr App R(S) 144 ***(refd)***
Re Radha Krishna Naidu [1962] MLJ 130 ***(refd)***
Re Soo Leot [1956] MLJ 54 ***(refd)***
Sahab Singh & Ors v. State of Haryana [1990] 1 SCR 512 ***(refd)***
Teh Cheng Poh v. PP [1979] 1 MLJ 50 ***(refd)***
Tukiran Taib v. PP [1955] MLJ 24 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 31, 35, 36, 37, 66(1)
Criminal Procedure Code, Chapter XXX1, ss. 300, 306, 311, 315, 316, 317, 322, 323, 324, 325(i), 326, 327
Penal Code, s. 330

Penal Code [India], s. 330

Other source(s) referred to:
Archbold 1993, vol 1, para 5-153
Criminal Procedure Code, Mallal, 4th edn, p 481

For the prosecution - Mohd Yusof Zainal Abidin (K Muniandy with him)
For the accused - Jagjit Singh (Surjan Singh with him); M/s Jagjit Singh & Co
Amicus curiae - Hj Sulaiman Abdullah; M/s Zain & Co
Watching brief for family of Lee Quat Leong (deceased) - Karpal Singh; M/s Karpal Singh & Co

Reported by S Dharmendran

JUDGMENT

KC Vohrah J:

Introduction

On 12 May 1995 Lee Quat Leong (the deceased) was found dead whilst in police custody. Two police personnel, the two respondents, were on 22 January 1996 charged in the Sessions Court in Kuala Lumpur for having voluntarily caused hurt to the deceased for the purpose of extorting from the said person information which might have led to the detection of the offence of the housebreaking of Mayban Finance, Taman Cheras, Kuala Lumpur. The offence is one under s. 330 of the Penal Code and it carries a maximum sentence of seven years and a liability to a fine for a person convicted for the offence. The Sessions Judge convicted and sentenced each of the respondents to 18 months imprisonment on the charge.

There was no appeal against the sentences. After the period limited for the appeal had passed the elder brother of the deceased filed a notice of motion under Miscellaneous Criminal Application 44-1-96 for the High Court to, *inter alia*, revise the sentences that had been passed on the respondents. Two grounds were relied upon. One was that the sentences imposed were "manifestly inadequate having regard to the facts and circumstances" of the case (see para. B of applicant's affidavit). The other ground was recited in para. 9 of his affidavit thus,

> In particular, I wish to respectfully state the learned Sessions Judge in imposing the sentence (that) she did, relied on *Lai Kim Hon and Ors v. Public Prosecutor* a 1980 case decided by the Federal Court despite Suffian LP (as he then was) specifically saying in the judgment that the case was not to be regarded as a precedent in future cases.

Application For Revision

There are many ways in which the attention of the High Court judge may be drawn to cases where decisions made in the Subordinate Courts may have to be revised; through newspaper reports of cases, through letters by members of the public or by aggrieved parties or by their relatives, through requests by magistrates or judges of the Sessions Court for revision of the decisions they had made; and through formal applications like the one filed by the brother of the deceased.

At the hearing of application of the formal application made by the brother of the deceased, the Deputy Public Prosecutor (together with another DPP) who had appeared at the proceedings in the Sessions Court confirmed that the judge of the Sessions Court had mentioned that she was relying on the case of *Lai Kim Hon & Ors v. PP* [1981] 1 MLJ 84 but he urged the court not to interfere with the sentences. The fact remains that the judge did rely on the said case which dealt with an offence under s. 330 of the Penal Code notwithstanding that Suffian LP in the preliminary judgment of the court (at 92) had indicated that (after the Federal Court did not alter the sentences appealed against) " ... this should not be regarded as a precedent in future cases". Hamid FJ (as he then was) who subsequently (at 93) gave the full judgment of the court clearly indicated that the sentences that had been passed by the trial judge and appealed against were not altered " ... because it would not be right to increase the sentences on the 2nd, 3rd and 4th appellants, without increasing the sentence of three years imposed on their superior, the first accused as to which there was no appeal by the public prosecutor". It has to be noted that the Federal Court has no power of criminal revision and could not have altered the sentence of the first accused in that case.

At the hearing of the application I was satisfied that *ex facie* a case had been made out for me, under s. 323 of the Criminal Procedure Code, to call for the record of the proceedings before the judge of the Sessions Court to satisfy myself "on the correctness, legality or propriety" of the sentences that had been passed.

The application, through the disclosures in the accompanying affidavit, brought to the knowledge of the High Court, firstly, that the learned judge was influenced by the sentences imposed by the trial judge in the case of *Lai Kim Hon* to impose the sentences that she did although enjoined by the Federal Court in respect of the sentences which the Federal Court did not alter that the case should not be regarded as a precedent in future cases; and secondly, that the sentences appeared to be incorrect as they appeared to have been manifestly inadequate, having regard to the grave nature of the offence under s. 330 of the Penal Code. As was pointed by Lord Atkin in *Chunbidya &*

Ors v. Emperor AIR [1935] PC 35 on a similar revision provision in the Indian Criminal Procedure Code,

> ... the powers of revision are given to the High Court alone, and the powers of revision are given to the High Court in the case of any proceedings the record of which has been called by itself or which has been reported for orders or which otherwise comes to its knowledge.

In exercise of the judicial power under s. 323 (see *PP v. Audrey Keong Mei Cheng* [1995] 2 CLJ 430 [1996] 2 AMR 1297) I therefore made an order calling for the record of the proceedings to satisfy myself as to whether in all the circumstances of the case the sentences that were passed are manifestly inadequate.

The Record Of Proceedings

I have perused the record of proceedings of the learned judge. The record contains a short note, her grounds, preceding the order that she made sentencing each of the respondents to 18 months imprisonment. Among the grounds she gave was that she was also relying "on the judgment of the Supreme Court (it should read "Federal Court") in the case of *Lai Kim Hon & Ors v. PP* that heard the appeal where the charges in that case are similar to the one faced by the accused in our case". She continued, "In that case the trio were more or less of the same rank as both the accused in this case and they were sentenced to 18 months and one year respectively". It appears that she was not aware of the reservations of Suffian LP in the preliminary judgment and of Hamid FJ in the subsequent judgment of the Federal Court on the sentences that were imposed by the trial court.

There was nothing in the note to indicate that she appreciated that an offence under s. 330 is one of the most serious offences known to the law. There were other features in the note which will be adverted to later which showed that she had misdirected herself by relying as mitigating factors that the offence was committed by the respondents while they were performing their official duties.

Principles Relating To Revision

Under s. 31 of the Courts of Judicature Act 1964 (Act 91) the High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to Criminal Procedure. The Criminal Procedure Code (FMS Cap 6) is the law for the time being in force. In the CPC, Chapter XXXl, ss. 323 to 327 relate to revision. It has to be pointed out that there are another three provisions, ss. 35, 36 and 37 of Act 91 relating to revision, with s. 35 giving general supervisory and revisionary jurisdiction over all subordinate courts in any criminal or civil matter or proceeding.

Having set out the statutory provisions, it behoves the court to examine the relevant case law. In *PP v. Kulasingam* [1974] 2 MLJ 26 Hashim Yeop A Sani J (as he then, was) stated the essence of what the High Court should have in mind when considering a revision,

> The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject to sub-ss. (i) and (iii) thereof. The object of revising powers of the High Court is to confirm upon the High Court a kind of 'paternalistic or supervising jurisdiction' in order to correct or prevent a miscarriage of justice. *In a revision the main question to be considered is whether substantial justice has been or will be done and whether any order made by the lower court should be interfered with in the interests of justice.* (emphasis added)

Buhagiar J in *Re Soo Leot* [1956] MLJ 54 referred to Jenkins CJ's discussion in relation to this wide discretionary power of revision given to the court where the Chief Justice recalled the words of an English judge as regards the argument that judicial discretion had deprived judges of the power the legislature had given to judges and agreeing it had not in *R v. Lachiram* ILR 28 Bom 533. This is the statement of Jenkins CJ which Buhagiar J set out with approval,

> If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion, and whenever it is argued that judicial decision has deprived us of the power that the Legislature has given us, I recall the of words the words of an eminent English Judge: ' I desire to repeat, he said, 'what I have said before, that this controlling power of the court is a discretionary power and it must be exercised with regard to all the circumstances of each, anxious attention being given to the said circumstances, which vary greatly. For myself, I say emphatically that this discretion ought not to be crystallised, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case. These weighty words appear to me to breathe the spirit that should guide us in the exercise of our discretionary powers of revision. This may perhaps increase our responsibilities and add to our labours, but no one would shirk the one or grudge the other.

The Supreme Court in *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35 [1987] 2 MLJ 69 referred to Buhagiar J's reliance (in *Re Soo Leot*) on what Jenkins CJ had stated in *R v. Lachiram* relating to judicial discretion. The Supreme Court at 71 clearly approved the concept "that the powers of the High Court in revision are exercisable at the discretion of the court and that discretion is untrammelled and free, so as to be fairly exercised according to the exigencies of each case.

The Supreme Court also clearly approved Jenkins CJ's dictum at 70 that "this controlling power of the court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly".

The Supreme Court in *Liaw Kwai Wah*, however, did "observe" that a judge may use the power of revision to increase a sentence only in exceptional cases. A perspective of the context of this observation has to be set out first.

In that case there was a reference under s. 66(1) of the Courts of Judicature Act 1964 which raised two questions for the determination of the Supreme Court. One of the questions was whether the High Court was right in ruling after an order of whipping had been carried on two persons that it had the power to increase the number of strokes. In the trial before the High Court judge the two persons had been convicted on their pleas of guilty on the offence of armed robbery and sentenced to imprisonment for two years and one stroke of the rattan each. After the sentences of whipping were duly carried out the High Court judge, acting in revision, enhanced the sentence of imprisonment on each of the persons to five years and the sentence of whipping to five strokes. There was no reference on the matter of the increase of the term of imprisonment. The Supreme Court ruled, in respect of the increase of the strokes, that the Criminal Procedure Code prohibits whipping to be executed in instalments and that in the circumstances it was clearly improper for the learned judge to exercise his revisionary power to impose additional strokes of whipping. Having decided this, and this is the *ratio decidendi* of the case, the Supreme Court made this observation at 71:

> At this point we wish to observe that a Judge may use the power of revision to increase a sentence only in exceptional cases. He is not to assume the role of a Public Prosecutor. The law is clear in that the Public Prosecutor is vested with a right to appeal against any sentence which he feels is manifestly inadequate. The power of revision is therefore to be used sparingly and should remain a discretionary power to be exercised primarily for purposes of correcting a miscarriage of justice. (See the observation of Hepworth J in *Re Radha Krishna Naidu* [1962] MLJ 130).

It has to be noted the above passage of the Supreme Court makes reference to the observation of J in *Re Radha Krishna Naidu* where the decision had nothing to do with the revision of a sentence. In that case, a private summons case, the magistrate dismissed the case and acquitted the accused. The complainant in the case tried to file a notice of appeal but it was rejected. The complainant argued that he did not require the sanction of the deputy public prosecutor to appeal.

The issue was brought to the High Court with a view to its acting in revision. Hepworth J stated that under the provisions of the CPC (Cap 21) (then applicable to Penang) when an accused person had been acquitted by a Sessions or Magistrate's Court there shall be no appeal except by the Public Prosecutor and it is in this context that the observation (referred to by the Supreme Court) of Hepworth J has to be understood. Hepworth J's observation is set out below and to be noted is that ss. 300 and 322 of the CPC (Cap 21) mentioned in the passage correspond to ss. 306 (appeal against acquittal with sanction of Public Prosecutor) and 325 (powers of judge on revision) respectively:

> It is, however, necessary for me to consider what action I should take, if any, on revision as there is no doubt about the jurisdiction of this court either upon an application of a private individual or when the case is referred to it by a Magistrate that this court can interfere by way of revision under the provisions of section 322 of the Criminal Procedure Code. In such cases if the Public Prosecutor has not preferred an appeal under section 300 the High Court ought not to interfere under section 322. It should only exercise revisional powers in exceptional cases when there has been a denial of the right of a fair trial or it is urgently demanded in the interests of public justice. In my opinion the legislature does not intend that a private party shall secure by an application in revision a right which is reserved for the Public Prosecutor only.

Coming back to the observation of the Supreme Court, the observation has also to be understood in the context of an extant statutory provision, s. 325 of the Criminal Procedure Code. Pursuant to his revisionary powers the judge may as provided for in s. 325(i) of the Criminal Procedure Code, exercise any of the powers conferred by ss. 311, 315, 316 and 317 of the Criminal Procedure Code. Under s. 316 the judge may *inter alia*:

> ... alter the finding, maintaining the sentence, or *with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence*. (emphasis added).

An application of the latter limb of this provision is seen in the oft quoted case of *Chunbidya & Ors v. Emperor* (referred to earlier) where the judicial committee of the Privy Council refused to grant leave to appeal to 4 petitioners who had had their sentences of transportation for life imposed on a conviction of murder by a divisional sessions judge revised by the High Court to that of death.

Viewing the observation of the Supreme Court in the context of the earlier principles of law that the Supreme Court had itself enunciated and bearing in mind the statutory provisions of the law which give the High Court the power to revise sentences and the context of Hepworth J's observation, it seems clear that the Supreme Court by its observation could not have meant

to have put a straightjacket so tight on the High Court that the High Court is barely able to exercise the revisionary powers given by a statutory provision to alter a sentence upwards. Clearly, even if it is "to be used sparingly", it has to be exercised "with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly" and the thrust would be primarily for the purposes of correcting a miscarriage of justice, again bearing in mind the essence underlined by Hashim Yeop Abdul Sani J in *PP v. Kulasingam*,

> In a revision the main question is whether substantial justice has been or will be done and whether any order made by the lower court should be interfered with in the interests of justice.

It is not as if the High Court has not previously intervened to revise sentences upwards. Under similar powers under the Indian Criminal Procedure Code, the Lahore High Court revised the sentences of two constables upwards for a similar offence under s. 330 of the Indian Penal Code (see *Lal Muhammad & Another v. Emperor* [1936] 37 Cr LJ 811). As recent as 1990, in respect of other offences, the Supreme Court of India in *Sahab Singh and Others v. State of Haryana* [1990] 1 SCR 512 and in *Govind Ramji Jadhav v. State of Maharashtra* [1990] 1 SCR 855 approved the enhancement of sentences by High Courts acting in revision although no appeals had been made by state authorities. In *Sahab Singh* the Supreme Court stated,

> The failure on the part of the State Government to prefer an appeal does not, however, preclude the High Court from exercising *suo motu* power of revision under s. 397 read with s. 401 of the Code since the High Court itself is empowered to call for the record of the proceeding of any court subordinate to it. Sub-s. 4 of s. 401 operates as a bar to the party which has a right to prefer an appeal but has failed to do so but that sub-section cannot stand in the way of the High Court exercising revisional jurisdiction *suo motu*.

Parties To The Revision

In an appeal, as was pointed in Mallal's Criminal Procedure Code (4 edn,) 481, the appellant has the conduct of the proceedings while in revision the court has the conduct of the proceedings. For the conduct of tie proceedings this court has had Tuan Haji Sulaiman Abdullah, a senior advocate and solicitor and a former Don of the University of Malaya, to assist, and he ably assisted, the court with his submission at short notice.

The Charge

There was a single charge in Bahasa Malaysia preferred against both the respondents. The English translation of the charge (which was also tendered in the court below) reads as follows:

That you jointly between the 4th of May 1995 at about 8.00 a.m. and the 12th of May 1995 at about 8.00 p.m., at Police Remand Centre. Ampat Tin, Batu 4 1/2, Jalan Ipoh, in the Federal Territory of Kuala Lumpur voluntarily caused hurt to one Lee Quat Leong (NRIC NO. 4477022) for the purpose of extorting from the said person, information which might lead to the detection of the offence of housebreaking of Mayban Finance, Taman Cheras, Kuala Lumpur and you had thereby committed an offence punishable under section 330 of the Penal Code.

Plea Of Guilt

The record shows that the charge was read and explained to both the respondents. They pleaded guilty and it was elicited from them that they understood the nature and consequences of their plea of guilt.

Statement Of Facts

The next step in the proceedings after a person has pleaded guilty to a charge is normally for the prosecution officer to disclose the facts or evidence of the case.

Except in the case where the charge relates to a minor offence or the charge itself discloses the facts it is the duty of the trial judge to take evidence of the nature of the crime charged (*Palan v. PP* [1932] MLJ 124; *Tukiran Taib v. PP* [1955] MLJ 24).

Twofold Purposes Of Statement Of Facts

What normally happens in a case where an accused has pleaded guilty to a charge is for the prosecuting officer to give to the court a summary of facts which will primarily go to show that the offence stated in the charge has been made out. The summary will also go to show the nature of the offence and will normally include details relating to the circumstances under which the offence was committed, the manner the accused committed the offence and these will go to show the gravity of the offence. If the court finds an offence has been made out on a plea of guilt this summary of facts should assist the court in taking into consideration relevant factors when it assesses the sentence to be passed (see *Abdul Kadir Abdul Rahman v. PP* [1984] 1 MLJ 80).

Nature Of Statement Of Facts

This summary will have to be culled from the investigation papers (IP) put up by the investigating authority. In most cases the investigating authority is the police and the IP put up will comprise admissible statements by witnesses, if any, to a crime, admissible statements of those who have knowledge of relevant facts relating to the crime, the admissible reports of investigation

officers, the admissible statements or reports of doctors and chemists, the admissible confessions, if any, of the person charged for the offence. The summary will also mention any exhibits that might have been recovered and which were involved in the case. In other words "the facts stated should be limited to facts which the prosecution are able to prove to and then only to facts necessary to establish the charge" (per Richard Talalla JC (as he then was) in *Lian Kian Boon v. PP* [1990] 2 CLJ 799 [1991] 1 MLJ 51 at 53).

Admission Of Facts

After the prosecuting officer has narrated the facts of the case the judge would have to satisfy himself whether the facts disclose the offence as stated in the charge or as put by Hashim Yeop A Sani J (as he then was) in *PP v. Soon Tiew Choon* [1976] 1 MLJ 189, "It is elementary but nonetheless fundamental that when the accused pleads guilty to a charge the brief facts given by the prosecuting officer must reflect the true and essential elements on the charge".

After satisfying himself that the elements on the offence have been made out, the next step a judge would need to take would be to ask the person charged whether he admits to the facts (see the observation of HS Ong J (as he then was) in *PP v. Mahmud* [1974] 1 MLJ 85 at 86). If he admits to the facts without dispute about the facts (if the facts do not make out the charge or there are disputes, see *Lee Weng Tuck v. PP* [1989] 2 MLJ 143, *R v. Newton* [1982] 77 Cr App R 13, *R v. Taggart* [1979] 1 Cr App R (S) 144, *R v. Kerr* [1980] 2 Dr App R (S) 54) then the court accepts the plea of quilt.

Prosecution's Statement Of Facts In Case

Before the statement of facts in this case as presented by the prosecutor is set out, something has to be said about the time honoured role of prosecutors which has been observed in our courts, whether they are Police Officers, Customs Officers or Deputy Public Prosecutors - all representing the public prosecutor. As was pointed out in *R v. Roy* IL R 42 Cal 422 the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the guilt or innocence of the accused; and the duty of the prosecuting officer is to represent not the police but the crown; and this duty shall be discharged fairly and fearlessly and with a full sense of the responsibility attached to his position (see also the view of judge David QC in *R v. George Maxwell (Developments) Ltd* [1980] 2 All ER 99 at 101).

In other words, the prosecutor must present the facts fairly in the light of admissible prosecution evidence, conceding to the defence those points of mitigation which are apparent in the prosecution evidence but equally giving weight to any aggravating factors which make the offence a serious one. I must state here that I am mindful of the powers and discretion of the attorney general

or the public prosecutor in relation to charges as discussed in the Supreme Court case of *Johnson Tan Han Seng v. PP* [1977] 2 MLJ 66 especially at 70 to 72, and in the Privy Council case of *Teh Cheng Poh v. PP* [1979] 1 MLJ 50 at 56.

In the case under review the deputy public prosecutor narrated the following facts:

> Pada 6 Mac 1995 Syarikat Kewangan Mayban Finance di Taman Cheras, Kuala Lumpur telah dipecah masuk oleh pencuri dan mengakibatkan kerugian harta benda berjuta ringgit. Berikutan siasatan yang dijalankan, pihak polis telah menangkap seorang lelaki bernama Lee Quat Leong (Nombor Kad Pengenalan 4477022) pada 27 April 1995 bagi membantu polis dalam siasatan berkaitan dengan kejadian pecah masuk syarikat kewangan tersebut.
>
> Lee Quat Leong telah ditahan di bawah reman dan 28 April 1995 hingga 3 Mei 1995 menurut seksyen 117 Kanun Prosedur Jenayah untuk tujuan soal-siasat. Pada 3 Mei 1995 apabila tempoh reman tersebut luput, Lee Quat Leong telah ditangkap semula di bawah seksyen 3(1) Ordinan Dharurat Ketenteraman Awam dan Pencegahan Jenayah) 1969 untuk tujuan soal-siasat lanjutan.
>
> Lee Quat Leong telah ditahan di Kem Tahanan Polis di Ampat Tin, Batu 4½, Jalan Ipoh, Kuala Lumpur. Untuk menjalankan soal-siasat lanjutan terhadap Lee Quat Leong dengan tujuan untuk memperolehi maklumat yang boleh menyelesaikan kes pecah masuk syarikat kewangan tersebut, satu pasukan khas soal-siasat telah dibentuk oleh pihak polis. Kedua-dua tertuduh adalah merupakan ahli pasukan tersebut.
>
> Pada masa Lee Quat Leong mula dibawa masuk ke dalam Kem Tahanan Polis tersebut, beliau telah diperiksa dan didapati sihat. Lee Quat Leong telah ditemui mati di Kem Tahanan tersebut pada jam lebih kurang 10.10 malam, 12 Mei 1995.
>
> Kedua-dua tertuduh dalam kes ini telah dengan sengaja menyebabkan kecederaan kepada Lee Quat Leong bagi maksud untuk memeras daripada beliau maklumat yang boleh membawa kepada pengesanan dan penyelesaian kesalahan berkenan kejadian pecah masuk syarikat kewangan tersebut. Kedua-dua tertuduh dalam kes ini telah melakukan kesalahan di atas dari jam lebih kurang 8.00 pagi, 4 Mei 1995 hingga jam lebih kurang 8.00 malam, 12 Mei 1995 sewaktu mereka menyoal-siasat Lee Quat Leong di kem Tahanan Polis tersebut.

The certified translation in English of the Bahasa Malaysia version is as follows:

> On 6th March 1995 finance company Mayban Finance at Taman Cheras, Kuala Lumpur was broken into by thieves which resulted in a loss of millions of ringgit worth of properties. Following the investigations carried out, the police had arrested one male named Lee Quat Leong (identity card No. 4477022) on 27 April 1995 to help the police in the investigation of the incident of the breaking-in of the said finance company.

Lee Quat Leong was detained under remand from 28 April 1995 until 3 May 1995 according to s. 117 CPC for the purpose of interrogation. On 3 May 1995 upon expiry of the remand period, Lee Quat Leong was re- arrested under s. 3(1) Emergency Ordinance (Public Order and Prevention of Crime) 1969 for the purpose of further interrogation.

Lee Quat Leong was detained at the Police Detention Camp at Ampat Tin, Batu 4½, Jalan Ipoh, Kuala Lumpur. For further interrogation of Lee Quat Leong with intention to gather further information that could solve the breaking into the said finance company, a special interrogation team was set up by the police. Both the accused are members of the said team.

When Lee Quat Leong was initially brought to the said Police Detention Camp, he was examined and was found healthy. Lee Quat Leong was found dead in the said Detention Camp at about 10.10 p.m., 12 May 1995.

Both the accused in this case did voluntarily cause injury to Lee Quat Leong with intention to extort information that could lead to the tracing and solving of the offence of the breaking into the said finance company. Both the accused in this case had committed the above offence from about 8.00 a.m, 4 May 1995 till about 8.00 p.m. 12 May 1995 during the interrogation of Lee Quat Leong at the said Police Detention Camp.

As was previously explained the facts narrated by the prosection officer would have to show that the elements constituting the offence a person is charged with have been made out.

In the case of the two respondents, the facts would have to disclose elements of the offence under s. 330 as specified in the charge, namely:

(1) **That the two respondents jointly caused hurt**

The reference to "jointly" is a reference to s. 34 of the Penal Code which states that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such person is liable for that act in the manner as if it were done by him alone. If two or more persons intentionally do a thing jointly it is just the same as if each hand has done it individually. Section 34 does not require proof that any particular accused was responsible for the commission of the offence.

The reference to the causing of hurt in s. 330 is a reference to the causing of bodily pain, disease or infirmity to any person (see s. 319) that is simple as contrasted with the 8 types of grievous hurt enumerated in s. 320 (emasculation, permanent privation of either eye, permanent privation of either ear, privation of any members or joint, destruction or permanent impairing of the powers of any member or joint, permanent disfiguration of head or face, fracture or dislocation

of a bone or tooth, any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits).

(2) **That the two respondents jointly caused such hurt in order to extort from the sufferer some information.**

(3) **That such information was required as possibly leading to the detection of an offence.**

In this case the information was required as possibly leading to the detection of the house breaking offence relating to the premises of Mayban Finance at Taman Cheras.

As regards the first element in this case which had to be proved it will be noticed that the statement of facts of the prosecutor did not specify the nature of the hurt, nor how the hurt was caused or whether any instrument was used to cause the hurt. No doctor's medical report was produced. But suffice it to say that since the offence was not a charge under s. 331 for voluntarily causing grievous hurt to extort information the hurt caused must have been simple hurt. It will be noticed that the charge specified the hurt as being caused between 4 May 1995 at about 8am and 12 May 1995 at about 8pm for the purpose of extorting information from the deceased making it an offence where the acts of causing hurt over a period are connected with one another and treated as one activity with the common purpose of extorting information from the deceased. This is borne out by the last sentence on the statement of facts of the prosecution which the two respondents admitted to.

As for the second and third elements, both the respondents and the court below relied, and this court would have to rely, on this statement given by the prosecutor. Both the accused in this case "did voluntarily cause hurt to Lee Quat Leong with intention to extort information that could lead to the tracing and solving of the offence of house-breaking of the said finance company".

I would like to reiterate that the prosecutor would have to present facts fairly in the light, of admissible evidence. If they do not have admissible evidence as to what actually took place in relation to an offence the prosecutor cannot invent theories or speculate on what took place. It is perhaps in that context that the lack of information as to what the nature of the hurt was, how the hurt was caused and what nature of the instrument, if any, was used to cause the hurt has to be viewed. The prosecutor would also have to state whatever aggravating factors, if any, which make the offence a serious one. It is in this context that the court below should have viewed, and it is certainly the bounden duty of this court to view, the very important last sentence of the statement of facts which the prosecutor had tendered in the court below and

which both the respondents had admitted to which showed up the serious nature of the offence - that the hurt was caused over a period of 9 1/2 days' interrogation.

> Both the accused had committed the above offence from about 8.00 a.m. 4th May 1995 till 8.00 p.m. 12 May 1995 during the interrogation of Lee Quat Leong at the Police Detention Centre.

In the court below the two respondents admitted the facts narrated and rightly the judge of the Sessions Court accepted their pleas.

Sentence

The punishment for an offence under s. 330 of the Penal Code is imprisonment for a term which may extend to seven years and the convicted person is also liable to a fine.

There is thus a discretion on the part of the court to determine the term of imprisonment which it may impose on a convicted person for the offence but the purpose of discretion, as was stated in a passage quoted by Visu Sinnadurai J in *PP v. Ravindra & Ors* [1992] 4 CLJ 2043 [1993] l MLJ 45 at 49, "is certainly to allow the sentencer to select the sentences which he believes to be the most appropriate in the individual case, considering both the facts of the case and any reports on the offender's character. The purpose of discretion is surely not to enable individual judges and magistrates to pursue purely personal sentencing preference".

As was pointed out by Visu Sinnadurai J the various theories and principles applicable in sentencing are well documented and the cases cited show that public interest is one important feature that has to be taken into account.

Public Interest

"In sentencing generally the public interest must necessarily be one of the prime considerations ... public interest should never be relegated to the background and must of necessity assume the foremost importance" (per Abdoolcader J (as he then was) in *PP v. Teh Ah Cheng* [1976] 2 MLJ 186 at 187).

One aspect of public interest is the principle of retribution.

Lord Lawton in the Court of Appeal case of *R v. Sarjeant* [1974] 60 Cr App R 74, in giving the judgment of the court referred to the classical principle of retribution in sentencing (he did also refer to the other principles of deterrence, prevention and rehabilitation). His Lordship said that the old testament concept of an eye for an eye and a tooth for a tooth no longer plays any part in criminal law and continued:

> There is, however, another aspect of retribution which is overlooked: *it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which they the courts can do this is by the sentence they pass.* The courts do not have to reflect public opinion. On the other hand, courts must not disregard it. Perhaps the main duty of the court is lead public opinion. (emphasis added).

On deterrence Lord Lawton remarked that there are "two aspects of deterrence - deterrence of the offender and deterrence of likely offenders". Deterrence to likely offenders is another aspect of public interest.

What cannot be gainsaid is that an offence under s. 330 is a very serious offence; it is one of the most serious offences known in law and the court must show its abhorrence of it; and the public interest requires the court to pass a deterrent sentence on the offender to deter likely offenders. As was pointed out by Young CJ in a revision case in *Lal Muhammad & Anor v. Emperor* [1936] 37 Cr LJ 811 the causing of hurt by responsible Police Officers engaged in the investigation of a crime is "one of the most serious offences known to the law" and "deterrent punishment should be inflicted on the offender ..." The learned Chief Justice underlined his reason why deterrent punishment should be inflicted:

> ... The result of third degree methods or of actual torture or beating such as in this case must be that innocent persons might well be convicted, confessions being forced from them which are false. In almost every case in which a confession is recorded, in Criminal Courts, it is alleged by the defence that the Police have resorted to methods such as these. It is seldom, however, that an offence of this nature is or can be proved. It clearly is the duty of the Courts when a case of this kind is proved to pass sentences which may have a deterrent effect.

In *Lai Kim Hon* Suffian LP after affirming the sentences passed by the trial judge but stating this should not be regarded as a precedent in future cases continued:

> Members of the Force who do their duty in accordance with the law will receive our and public support and encouragement; *but those who treat suspects in a cruel manner can expect to receive only very severe punishments from the courts.* Parliament and the public will not allow a Savak to be established here, bringing disrepute to those responsible for the government and for the administration of justice". (emphasis added)

It is unfortunate that this serious aspect of the public interest was not drawn to the attention of the learned judge before she imposed the sentences that she did and it is quite clear she also missed the strong call for stiffer sentences in the future and the reasons why they were needed.

There is another compelling consideration to take into account. Police officers are custodians of the law and they have to uphold, not breach, the law. By subjecting members of the public to acts of violence they in fact infract the very law that prohibits the inflicting of violence by any person on another person and they incalculably undermine and subvert the confidence and trust placed by the public in our police force. The judge should have considered the grave injury done to the police force and to the public's trust in it.

The judge of the Sessions Court also erred in principle when she said that the offences were committed by the two respondents while they were performing their official duties and treated that as a mitigating factor. Overzealousness which involves such blatant breaching of the law with the use of violence can never be a mitigating factor.

Clearly the courts are under a duty, and in the larger interest of substantial justice, to show their abhorrence of this type of crime. While the judge of the Sessions Court did state that she took into account public interest, that, unfortunately, was not sufficiently reflected in the sentences which she passed on the two respondents.

Proportionality Of Sentence And Mitigating Factors

The sentencing of a sentencer must not be such that it is out of proportion to the gravity of the offence on which the offender has been convicted.

The prescribing of a maximum penalty in respect of an offence not only marks the limits of the court's discretionary power as to sentence, it also ordinarily prescribes what the penalty should be in the more serious types of cases falling within the relevant class of the offence meriting the maximum punishment prescribed. FC, *Loh Hock Seng & Anor v. PP* [1980] 2 MLJ 13 at 14.

The principle of holding in abeyance maximum sentence for the most serious likely instance of the offence should mean that an offender who pleads guilty does not receive the maximum sentence. His plea of guilt provides him with mitigation, so the sentencing court must leave room for the passing of a more severe sentence in a case where the offence is just as grave and the offender pleads not guilty.

In *R v. Barnes* [1983] 5 Cr App R(S)368 Barnes who had 12 convictions including one for rape which had resulted in a four year sentence of imprisonment, pleaded guilty to attempted rape of a 15 years old girl. He had collected the victim and his own two daughters from scholl, and, instead of driving the victim to her home as arranged, took her to his house. He sent his daughters to bed, gave the victim some drink and then took her into the garden where he threatened her with a knife, squeezed her throat and ordered her to strip. One of his daughters heard what was going on and intervened,

as a result of which the victim was able to escape. It was one of the worst cases of attempted rape. The Court of Appeal reduced the sentence of seven years – the maximum for attempted rape - to one of six years, because the maximum sentence should have been reserved for a case where the offender was convicted after pleading not guilty.

On the other hand in a local case *PP v. Leo Say and 2 Ors* [1985] 2 CLJ 155, three accused persons pleaded guilty to a charge under s. 304 of the Penal Code of culpable homicide not amounting to murder of an estate manager where the maximum sentence is 20 years imprisonment. The three, one of them a police officer, had originally been charged under another law for various offences under the Firearms (Increased Penalties) Act 1971 where death is the mandatory sentence. The facts showed that a firearm was discharged in an attempt to commit robbery with the result that the estate manager met with his death. The 3 accused in pleading guilty also pleaded for leniency on the ground that they had aged parents and families to look after and also that the two accused had no previous convictions.

Chan J (as he then was) sentenced each of the accused to the maximum of 20 years imprisonment and refused to give them credit for their plea of guilt, stating at 158:

> As I have said earlier, all three pleaded guilty. Although they are entitled to some credit for that, it must be set off against the enormity and seriousness of the crime they committed ...

The reference to the reduction of sentence on a plea of guilty is in recognition of the principle enunciated by Cummings-Bruce LJ in *R v. Boyd* [1980] 2 Cr App R(S) 234 that the policy of the court is that where a man pleads guilty which does give rise to public advantage and avoids the expense and nuisance of a long trial, which may sometimes be a long one, the court encourages pleas of guilt by knocking something off the sentence which would have been imposed if there had not been a plea of guilt.

There being a lack of certain information in the statement of facts, I think the two persons do not deserve the maximum sentence. Coming back to the extant case under review, had the two respondents claimed trial and had the two respondents been convicted the most probable sentence would have been five years imprisonment each, given the very serious nature of the offence but taking into account the circumstances of the case as explained earlier. What discount should then be given for a plea of guilt?

The Supreme Court in *Mohamed Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405 [1988] 1 MLJ 167 was of the view that a plea of guilt will entitle the accused person to a discount of between one-quarter to one-third of the sentence. It is to be noted that in England, for 1993, the normal reduction given by the Court of Appeal was between one-fifth to one-third of the sentence which would be imposed on a conviction after trial (See *Archbold 1993 Re* - Issue vol. 1, para. 5 - 153).

In the present case, I think a third off the sentence of five years should be given and there should be an added discount given for two reasons.

The first reason is connected with a principle that is illustrated by the case of *R v. Hoult* 12 Cr App R(S) 180 where it was held that an offender who voluntarily surrenders to the police and admits an offence which cannot otherwise be proved against him was entitled to more than the usual discount.

As I had pointed out earlier, the statement of facts of the prosecution did not indicate the nature of the hurt caused to the deceased (no medical report was produced either) nor what weapon, if any, was used. All that is known was that the causing of hurt stretched for 9 1/2 days during the interrogation of the deceased. As was explained earlier the facts that were presented could only have been in respect of admissible prosecution evidence that was available, evidence which would have been adduced in a trial had the two persons claimed trial to the charge. The inference for the lack of such information must be that had the two respondents claimed trial the prosecutor may not have been able to prove the offence. In spite of that they pleaded guilty and admitted the facts and this does show remorse.

The second reason is connected with the other mitigating factors which were made known to the court below by Encik Jagjit Singh which need to be taken into consideration; that they both had good records of service in the police force and that they would lose and in fact lost their jobs and their pensions on conviction.

In all the circumstances of the case, each of the accused should have been sentenced to 36 months and clearly the sentence of 18 months imposed on each by the judge of Sessions Court is manifestly inadequate. In exercise of my powers of revision so that substantial justice will be done, I enhance the sentence of imprisonment of each of the respondents from 18 months to 36 months as from the date of sentence by the judge on 22 January 1996.

I wish to express my appreciation and thanks to the Deputy Public Prosecutor Encik Mohd. Yusof, Defence Counsel Encik Jagjit Singh and Amicus Curiae Tuan Haji Sulaiman for the fair and comprehensive manner in which they made their submissions before me.